FILED
AUG 25 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1260

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

COPPERWELD CORPORATION and REGAL TUBE COMPANY,
Petitioners,
v.
INDEPENDENCE TUBE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a parent corporation and its wholly-owned subsidiary are capable of conspiring together in violation of Section 1 of the Sherman Act.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE SUPPORTING PETITIONERS

This brief is filed on behalf of the Chamber of Commerce of the United States and the National Association of Manufacturers in support of the petitioners. Consent to file this brief has been obtained from counsel for all parties and has been filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States (the "Chamber"), a non-profit membership organization, is the nation's largest federation of corporations, trade associations, chambers of commerce, and business and professional persons, with an aggregate membership exceeding 209,000. The Chamber's membership reflects the diversity of the nation's business and professional life and includes corporations of all sizes and types. One of the

Chamber's principal functions is to present its members' views to the federal courts on issues of concern to the business community, and it has previously appeared before this Court as amicus curiae to address questions arising under the antitrust laws. *See, e.g., United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978); *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975).

The National Association of Manufacturers (the "NAM") is a non-profit voluntary business association incorporated under the laws of the State of New York representing more than 13,000 manufacturing and related business concerns which, in the aggregate, account for an estimated 85 percent of all manufacturing employees and 80 percent of the nation's industrial output. In addition, through its Associations Department and the National Industrial Council, the NAM is affiliated with approximately 158,000 businesses.

The intra-enterprise conspiracy doctrine at issue in this case is a matter of particular concern to a broad range of the Chamber's and the NAM's membership and to the American business community generally, because the doctrine severely penalizes the use of a form of internal business organization that has important benefits for many business enterprises.

SUMMARY OF ARGUMENT

The question the Court has agreed to review in this case is the proper legal standard to be applied in determining whether a corporation violates Section 1 of the Sherman Act by "combining or conspiring" with its wholly-owned subsidiary. As a general rule, the Chamber and the NAM submit, the proper standard is that there can be no such conspiracy under Section 1 between constituent parts of a business enterprise. To impose antitrust liability on "combinations" between entities that are already economically combined severely penalizes the

choice of a widely-used form of internal organization with important business advantages that do not ordinarily implicate substantive antitrust concerns. This penalty on the use of separately incorporated divisions or subsidiaries is not justified by anything in the policy or objectives of the antitrust laws.

ARGUMENT

I. The Intra-Enterprise Conspiracy Doctrine Unreasonably Distorts Decisions Regarding Internal Corporate Organization That Do Not Raise Antitrust Concerns.

Section 1 of the Sherman Act applies only to combinations and conspiracies in restraint of trade. 15 U.S.C. § 1. It requires concerted action among a plurality of actors. It cannot be violated by unilateral conduct.

As a result, it is well-established that no action taken by a single corporation, acting alone, gives rise to liability under Section 1. This is so whether the corporation has a highly integrated decision-making structure, or whether it is organized in separate divisions exercising a high degree of day-to-day autonomy. Even if the governing decisions are made jointly by top corporate management and an unincorporated division, they cannot by themselves violate Section 1, no matter what their impact on competition or competitors.[1]

The intra-enterprise conspiracy doctrine holds that the same internal business decisions, made in the same way and for the same purposes, can give rise to the full force of Section 1 liability if a corporate enterprise has chosen to incorporate its divisions as wholly-owned subsidiaries. The doctrine thus attaches antitrust significance, and the

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[1] *See* Pet. App. at A-9; *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 587 n.19 (8th Cir. 1981); *H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82-84 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

risk of severe liability, to the choice of a particular method of internal organization. By imposing the threat of antitrust sanctions, the doctrine burdens or skews internal business decisions that are unrelated to antitrust concerns.

A. *The Use Of Wholly-Owned Subsidiaries Affords Valuable Business Benefits Unrelated To Antitrust Concerns.*

Such a drastic difference in the treatment of incorporated as opposed to unincorporated divisions cannot be attributed to any substantive difference between these alternative forms of internal organization. Where the subsidiary corporation is wholly owned, the difference is one of form only. While the corporate formalities must be respected in order to accomplish some of the benefits of incorporation, separate incorporation does not in any substantive way free a division from the control of the parent company. The managers of the subsidiaries serve at the pleasure of their sole stockholder, and their mandate is to serve its interest. Although some subsidiary corporations enjoy substantial autonomy in day-to-day decisionmaking, the same is true of many unincorporated divisions;[2] and in both cases such autonomy exists only at the sufferance of top management. In short, the choice of the form of separate incorporation in itself implies nothing about how or by whom business decisions are actually made.

Instead, the use of subsidiary corporations is dictated by practical business and legal considerations. In a variety of circumstances, wholly-owned subsidiary corporations offer important business advantages that are frequently pro-competitive and are generally unrelated to anti-competitive objectives or consequences.[3]

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[2] O. Williamson, *Markets and Hierarchies* 148-50 (1975).

[3] *See Report of the Attorney General's National Committee to Study the Antitrust Laws* 34 (1955) ("The use of subsidiaries is

The decision of an American corporation to incorporate a subsidiary in a foreign country, for example, is usually dictated by the laws of that country or by the exigencies of foreign operations.[4] Some countries require local incorporation. In others, the failure to incorporate a local operating unit can subject the American parent to undesirable tax, regulatory, or foreign private law consequences.[5] Separate incorporation is in many instances essential in order to permit American corporations to do business abroad, and neither the motives for nor the results of such separate incorporations can be viewed as anything but pro-competitive.

Indeed, the benefits of foreign subsidiaries to American corporations that do business abroad are so significant that the United States has consistently opposed adoption of an intra-enterprise conspiracy doctrine in international codes of multinational corporate conduct.[6] In 1980, after a sustained negotiating effort, the United States succeeded in persuading the United Nations General Assembly to include in its international antitrust code language expressly repudiating the concept of intra-enterprise conspiracies. The provision of that code analogous to Section 1 of the Sherman Act states that collusion between enterprises does not include

> "dealing[s] with ea[c]h other in the context of an economic entity wherein they are under common con-

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generally induced by normal, prudent business considerations."); *see also* M. Eisenberg, *The Structure of the Corporation* 280 (1976); C. Rohrlich, *Organizing Corporate and other Business Enterprises* § 10.02 (5th ed. 1975); McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 Va. L. Rev. 183, 186 (1955); Murphy, *Corporate Divisions v. Subsidiaries*, 34 Harv. Bus. Rev. 83, 87 (1956); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. Rev. 20, 26-28 (1968).

[4] *See* 1 J. Atwood & K. Brewster, *Antitrust and American Business Abroad* § 7.37, at 222 (2d ed. 1981).

[5] *Id.*

[6] *Id.* § 7.39, at 226-27; *see* 2 *id.* §§ 13.02-13.08.

trol, including through ownership, or otherwise not able to act independently of each other." [7]

The diplomatic effort behind that achievement, which ironically is undermined by renewed application of the intra-enterprise conspiracy doctrine under the Sherman Act, underlines the importance of separate incorporation to the efforts of American multinational corporations to compete abroad.

The need for separate incorporation in foreign operations is mirrored in some domestic jurisdictions. In order to ensure regulatory and legal accountability or to protect local businesses, many states attempt to restrict access to local markets for businesses not incorporated in those states, place restrictions on out-of-state corporations, or make it as difficult to qualify to do business in the state as it is to incorporate a local subsidiary.[8] Accordingly, out-of-state corporations commonly incorporate a subsidiary when entering markets in those states. Far from restraining trade, the consequence of these separate incorporations is to increase competition in protectionist states.

In some cases, separate incorporation is motivated by a desire to minimize tax liabilities.[9] Although federal

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[7] The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices ¶ D, § 3, U.N. Doc. TD/RBP/Conf./10/Rev. 1. This feature of the code was emphasized in a joint letter authored by the Departments of State and Justice announcing the new guidelines and explaining them to the American business community. *See* Open Letter from R. Hormats, W. Baxter & D. Robinson (Nov. 9, 1981), *reprinted in* 82 Dep't St. Bull. 34 (Jan. 1982).

[8] *See* 2 A. Dewing, *The Financial Policy of Corporations* 983-85 (5th ed. 1953); C. Rohrlich, *Organizing Corporate and other Business Enterprises* § 10.02 (5th ed. 1975); *see also Interstate Transit Lines* v. *Commissioner*, 319 U.S. 590, 592 (1943).

[9] *See generally* B. Bittker & J. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶¶ 15.01-15.05 (4th ed. 1979).

tax law changes of the late 1960's have reduced some of the tax incentives for separate incorporation, many legitimate federal tax advantages remain.[10] Moreover, parent corporations that responded to the greater tax advantages available before 1970 have retained their multi-corporate forms in part because of the burdens that de-incorporating subsidiaries would entail. Separate incorporation also permits multi-corporate enterprises to minimize state taxation.[11] From an antitrust standpoint, such tax minimization effectuated through separate incorporation is at least neutral, if not affirmatively pro-competitive.

Many companies incorporate a subsidiary in order to preserve the good will or exceptional performance associated with an acquired business. The acquiring corporation sometimes chooses to retain the separate incorporation of its new subsidiary in order to preserve the latter's identity or reputation in a particular line of business or geographic area. In other cases, the management of the acquired corporation insists as a condition of the sale that it be permitted to retain a nominally separate corporate identity. Assuming that the acquisition itself satisfies the requirements of Section 7 of the Clayton Act, 15 U.S.C. § 18, maintaining separate incorporation in such cases has no consequences with which the antitrust laws should be concerned.

Other common motivations for separate incorporation include attainment of financial flexibility or limited liability; compliance with federal regulatory statutes that require regulated businesses to incorporate subsidiaries in order to enter non-regulated lines of business;[12] and

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[10] *Id.*

[11] Indeed, petitioner Copperweld, after acquiring the assets of Regal in 1972, set up Regal as a separate corporation in order to avoid discriminatory double taxation at the state level. *See* Petition for Certiorari at 3; Kaplan Tr. 5702; Smith Tr. 3051.

[12] *E.g.*, Bank Holding Company Act, 12 U.S.C. § 1843(c)(8).

improved management performance [13] or better labor relations [14] thought to result from the maintenance of a separate corporate identity.

All these diverse reasons for separate incorporation described above are geared towards either affording a business enterprise an opportunity to compete or enhancing its competitive posture. In some cases, the use of separate corporations is necessary in order that the enterprise may compete at all in a particular country or state or in a particular line of business. In many cases, the result is to increase output, improve efficiency, and benefit consumers—all objectives that a sound antitrust policy seeks to facilitate. In any event,

> "[t]he business, tax, social, or strategic reasons for separate incorporation do not make it any more or less likely that competition is being harmed by the defendant's activities. The fortuity of independent incorporation does not serve to identify the behavior that the antitrust laws should control."

P. Areeda, *Antitrust Analysis* 399-400 (3d ed. 1981). None of these reasons for separate incorporation is anti-competitive, and none is of a nature that on its face calls for any heightened antitrust scrutiny.

B. *The Intra-Enterprise Conspiracy Doctrine Severely Penalizes And Deters The Use Of Wholly-Owned Subsidiaries.*

Notwithstanding the absence of anti-competitive implications in a decision to use wholly-owned subsidiaries, the intra-enterprise conspiracy doctrine imposes a severe penalty upon that choice. Any corporation that adopts this form of internal organization thereby opens a wide range of otherwise internal business decisions to the risk of antitrust liability under Section 1.

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[13] *See National Carbide Corp.* v. *Commissioner*, 336 U.S. 422, 438 n.21 (1949); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. Rev. 20, 28 (1968).

[14] *See Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 726 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

The threat of civil antitrust liability is, and was designed to be, a powerful deterrent. Liability under Section 1 entails both treble damages—three times the actual damages incurred—and generous attorneys' fees for the prevailing party. *See* Clayton Act § 4, 15 U.S.C. § 15. The remedy is punitive in its intent and in its effect. It was designed by Congress to make the consequences of an antitrust judgment so intimidating that actual or potential competitors would steer far clear of potentially anticompetitive conduct. *See* 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 331b, at 149-50 (1978). And where companies receive good antitrust advice, or where they have been burned by oversized verdicts or settlements of antitrust lawsuits, the deterrent works.

The intra-enterprise conspiracy doctrine trains the full fire power of that potent deterrent against the use of separately incorporated divisions or subsidiaries. It thereby deprives some business enterprises that would otherwise have chosen incorporation of the uncontroversial benefits of the multi-corporate form. And it impels companies that adopt or retain that form in spite of the risk to impose artificial constraints on dealings between parent and subsidiary in the interest of avoiding interaction between them on matters that may involve antitrust risk.

The deterrent effect is heightened by the inherent uncertainty about what conduct will be deemed offensive to the antitrust laws in particular cases. The standards of the antitrust laws are broad and general. *See Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360 (1933). They are constantly evolving. Their application frequently depends heavily on complex particular facts. And they are ultimately interpreted most often by juries, who may be neither conversant with nor sympathetic towards the business context against which the challenged conduct is to be measured. Moreover, like all effective deterrents, the treble damage remedy under the antitrust laws is capable of hitting unintended targets. The

expenses and burdens of antitrust litigation, the uncertainties of jury verdicts, and the consequences of an adverse result can make antitrust complaints effective *in terrorem* devices in the hands of antitrust plaintiffs, capable of affecting business conduct and exacting significant settlements even in some cases where they have little merit. These inherent aspects of potential antitrust liability are all exacerbated under the intra-enterprise conspiracy doctrine, where the risk of liability attaches to internal business decisions and conduct that are ordinarily outside the scope of Section 1, and where the requirements of the law are accordingly even harder to predict.

The deterrent or penalty on the use of separate corporations is not reduced by the efforts of some lower courts to narrow the scope of the conduct to which the intra-enterprise conspiracy doctrine may be applied. Those limiting standards may reduce the number of cases in which liability is actually imposed on conduct of a parent and its wholly-owned subsidiary. But they do not reduce —indeed, they may increase—the uncertainty as to when or whether the doctrine will be applied.

The Court of Appeals below, applying an "all facts and circumstances" test, identified numerous factors to be considered in determining "when there is enough separation between the [parent and subsidiary] to make treating them as two independent actors sensible." Pet. App. at A-11. The jury had been specifically instructed as to nine factors, and was told to consider "any other facts that you find that are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other." Pet. App. at A-41. It was left to the jury, in answering this almost metaphysical question, to weigh all the identified and unidentified factors, determine how they might bear on the question of capacity to conspire, assess their relative weight, and arrive at a necessarily subjective and conclusory result. Other courts have iden-

tified additional relevant factors or have weighed the same factors differently.[15] No corporation with a wholly-owned subsidiary can predict with confidence how such a kaleidoscope of potentially relevant facts and circumstances will be resolved in any particlular case, so as to be able to avoid the risk of antitrust liability for internal business decisions.

Other limiting rules are similarly difficult to apply with any sufficient degree of predictability. One test, for example, attempts to determine whether an intra-enterprise collaboration was designed to restrain the trade of a third party. In practice, most pricing, marketing, and selling policies are designed at least to affect the trade of third parties, and virtually all such decisions will in fact have an effect on competitors even if they are not so designed. A competitor who is particularly affected by such a decision and who suffers serious injury will almost always be able to state a *prima facie* claim, sufficient at least to get to a jury, that the conduct was designed to injure him or others similarly situated.

Similarly, following this Court's dicta in *Keifer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951), and *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 116 (1975), a few courts have attached importance to whether or not commonly-owned companies "hold themselves out" as competitors.[16] The cases that apply this test have not attempted to define what constitutes such a "holding out." None has suggested that the companies must actually claim to be competing. Instead, "holding out" seems to mean only that they are identified as separate corporations and that they sell products that may be

[15] *See, e.g., Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 726 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23, 55-61 (1981).

[16] *See, e.g., University Life Ins. Co.* v. *Unimarc, Ltd.*, 699 F.2d 846, 852 (7th Cir. 1983); *Aaron E. Levine & Co.* v. *Calkraft Paper Co.*, 429 F. Supp. 1039, 1043-46 (E.D. Mich. 1976).

viewed as alternatives by some purchasers. For the many multi-corporate enterprises whose subsidiaries sell in related markets, this rule provides no escape at all from the threat of intra-enterprise liability.[17]

Moreover, even if the limiting rules were sufficiently predictable to identify the kinds of intra-enterprise dealings that may give rise to liability under Section 1, they focus on questions that are themselves not significant for antitrust purposes.[18] They also introduce their own additional distortions into the internal decisionmaking process. The thrust of rules such as the "all facts and circumstances" and "holding out" tests is to find liability where subsidiary corporations, though subject to the ultimate control of the parent, are given some delegated day-to-day operational autonomy. The rules thus have the perverse effect of discouraging decentralized decisionmaking within a business enterprise, even as they are applying Section 1 on the theory that separate decisionmaking within a multi-corporate enterprise should be preserved.

In sum, whether in its pure form or under limiting rules, the intra-enterprise conspiracy doctrine severely burdens the use of wholly-owned subsidiaries and irrationally distorts internal corporate decisionmaking.

II. The Burdens Imposed By The Intra-Enterprise Conspiracy Doctrine Are Not Required By Section 1.

The remaining question is whether this unreasonable burden on the choice of a multi-corporate form of internal organization is nonetheless required by the terms or clear intent of Section 1. We submit that it is not.

[17] Another limiting principle, the so-called "sole decisionmaker rule," creates an exemption to the intra-enterprise conspiracy doctrine for corporations that are under the ownership and direction of a single person. *See Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979). This rule does provide reasonable certainty and predictability to one-man corporations, but it leaves the vast majority of multi-corporate enterprises subject to the full force of the doctrine.

[18] *See* Part II, *infra*.

As shown above, the distinction between an unincorporated division, which cannot conspire, and an incorporated division or wholly-owned subsidiary, is a distinction without a difference for antitrust purposes. The distinction is not based on any articulated theory as to how the objectives of Section 1 are served by extending its reach to coordinated actions between a parent and its wholly-owned subsidiary that would not otherwise offend the antitrust laws. Neither the decisions of this Court that appeared to recognize the possibility of a conspiracy between a parent and its wholly-owned subsidiary,[19] nor any of the courts of appeals that have applied the doctrine in such cases, has attempted such a justification. The distinction is based instead on the fact that a separately incorporated subsidiary is legally a distinct person, whereas an unincorporated division is not. Therefore, a joint act of a parent and its subsidiary can be

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[19] The Court stated in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968), that since a parent and subsidiary "availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." This statement was not necessary to the holding in *Perma Life*, which also rested on an alternative ground. The Court did not explain why the "privilege" of separate incorporation justifies heightened antitrust scrutiny. Examination of the Court's language in *Perma Life* suggests that the Court had in mind the traditional doctrine of state corporation law applicable to piercing the corporate veil. *See* F. Powell, *Parent and Subsidiary Corporations* 4-5 (1931) (enjoyment of the privilege of limited liability gives rise to obligation to observe corporate formalities). This doctrine does not have application to antitrust concerns. *See* Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23, 63-66 (1981).

The other decisions of this Court that appear to recognize the possibility of intra-enterprise conspiracies likewise do not address the question of how the doctrine accords with the policy of Section 1. *See Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons., Inc.*, 340 U.S. 211 (1951); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947).

viewed as the act of two legal persons and can technically satisfy the plurality requirement of Section 1.

But the mere fact that two legal persons are involved does not establish that they are capable of conspiring within the meaning of Section 1.[20] The question is whether the concerted act is at root a bilateral act of the kind Section 1 is designed to reach. Section 1 imposes liability for conduct arising from combinations or conspiracies that would give rise to no antitrust claim at all if it was unilateral conduct with the same intent and the same effect on third parties. The key to Section 1 liability is that the combinations it proscribes eliminate competition or potential competition between independent economic actors who ought not to be joining forces.

By that measure, "combinations" between a parent and its wholly-owned subsidiary are manifestly not within the purview of Section 1. Such "conspirators" are already inseparably combined. There is no effective competition between them; if they do engage in anything resembling competition, it is competition controlled by and instantly extinguishable by the parent, and permitted only to the extent it is judged to serve the parent's economic interests. Joint acts of such economically indistinguishable entities do not eliminate any competition that Section 1 protects.

That the antitrust laws are concerned with economically separate actors, not with legally separate persons, is evident in other areas of antitrust law. Antitrust

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[20] *See Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir.), *cert. denied*, 103 S.Ct. 362 (1982); *Tose* v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879, 893-94 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981); *H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Morton Buildings of Nebraska, Inc.* v. *Morton Buildings, Inc.*, 531 F.2d 910, 916-17 (8th Cir. 1976); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82-84 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Poller* v. *Columbia Broadcasting System*, 284 F.2d 599, 603 (D.C. Cir. 1960), *rev'd on other grounds*, 368 U.S. 464 (1962).

analysis commonly treats the economic interests of the parent and subsidiary as the same. This is so, for example, in determining the extent of market power for purposes of the anti-monopolization provisions of Section 2 of the Sherman Act, 15 U.S.C. § 2; or in measuring the impact of a merger under Section 7 of the Clayton Act, 15 U.S.C. § 18.[21] If a company acquires another corporation, the acquisition must pass muster under Section 7 on the assumption that the acquisition eliminates competition between the two companies. The absence of genuine competition is presumed. Where an acquisition has survived antitrust scrutiny on this presumption, what sense does it make to require the parent and its new subsidiary to act as though they are independent competitors?

Indeed, under these provisions, common *control* is enough to establish the economic unity of separate corporations, even where there is substantial outside ownership. Where there is no outside ownership at all, there can be no possible basis for contending that a parent and subsidiary are separate actors whose joint acts should be policed under Section 1.[22]

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[21] The formal legal separateness of parents and subsidiaries has aslo been recognized as irrelevant under other provisions of the antitrust laws. For example, under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), a sale from a parent to its wholly-owned subsidiary is not a sale to a purchaser for purposes of that section. *See Security Tire & Rubber Co.* v. *Gates Rubber Co.*, 598 F.2d 962, 966-67 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979). Similarly, the prohibition of Section 10 of the Clayton Act, 15 U.S.C. § 20, against certain dealings of a common carrier and a company with an interlocking directorate is inapplicable to dealings between a parent and its wholly-owned subsidiary. *See Cleary* v. *Chalk*, 488 F.2d 1315, 1322-23 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974).

[22] Where there is outside ownership, many of the same considerations support the conclusion that no parent and subsidiary under common control can be considered separate economic entities capable of conspiring together. It is, however, unnecessary to reach that question to decide the question under review in this case.

CONCLUSION

Parent corporations, whether they separate their operations and functions on a subsidiary or a divisionalized basis, reign over a single economic enterprise. This Court's analyses of the Sherman Act have commonly been guided by "demonstrable economic effect rather than . . . formalistic line drawing." *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 59 (1977); *see also Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962). The intra-enterprise conspiracy doctrine draws a line at the point of separate incorporation. That point has no significance for antitrust purposes.

Accordingly, the Chamber and the NAM urge this Court to reverse the decision of the court below and to hold that a parent corporation and its wholly-owned subsidiary are not capable of conspiring with one another within the meaning of Section 1.

Respectfully submitted,

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August 25, 1983